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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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In re ELBERT BROWN,  
  
on Habeas Corpus.

C080301  
  
(Super. Ct. No. 101437)

In 2010, petitioner Elbert Brown was convicted of burglary and conspiracy to commit burglary (Pen. Code, §§ 182, 459)<sup>1</sup> with five prior prison term enhancements (§ 667.5, subd. (b)) and sentenced to 11 years in state prison. Petitioner subsequently filed successful Proposition 47 (§ 1170.18) petitions to reduce each of the felonies underlying the prison priors to misdemeanors. He then filed a petition for habeas corpus in the Sacramento County Superior Court asserting that the prison priors should be stricken pursuant to Proposition 47. The matter was transferred to the court in which defendant had been convicted of the crimes and prison priors, the Yolo County Superior

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Court, which denied the petition, finding petitioner had not established a prima facie case for relief.

Petitioner next filed a habeas petition in this court seeking the same relief, which we denied. The California Supreme Court granted the petition for review and transferred the case to this court with directions to issue an order to show cause, which we issued.

Having reviewed this matter, we conclude that reducing the felony underlying a prior prison term to a misdemeanor does not mandate striking the prison prior. We shall therefore deny the petition.

## DISCUSSION<sup>2</sup>

In November 2014, the voters passed Proposition 47, the Safe Neighborhoods and Schools Act (Act), creating section 1170.18, which provides in pertinent part: “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.” (§ 1170.18, subd. (a).) “Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.” (§ 1170.18, subd. (k); hereafter subdivision (k).) Since the prior prison term

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<sup>2</sup> We omit any description of the facts of petitioner’s crimes, as they are unnecessary to resolve this case.

enhancement requires that defendant be convicted of a felony and have served a prison term for that conviction (§ 667.5, subd. (b)), this raises the question of whether a prior prison term enhancement based on what would now qualify as a misdemeanor conviction survives the Act.<sup>3</sup>

The Attorney General asserts in the return that the Act does not apply to the prior prison term enhancement because the enhancement is not referred to anywhere in the Act and because reducing the underlying prior conviction to a misdemeanor does not negate petitioner's recidivist status. Petitioner argues that, by enacting subdivision (k) as part of the Act, the voters intended that reducing a felony conviction to a misdemeanor would prevent use of that prior conviction to support a prison prior. He additionally claims this interpretation is supported by the canons of statutory interpretation that lists are ordinarily exclusive, remedial statutes are to be interpreted liberally, the rule of lenity, and that interpretations raising difficult constitutional questions are to be avoided.

We begin by noting that section 1170.18 does not apply retroactively. Subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). *Rivera* found that subdivision (k), which parallels the language from section 17 regarding the reduction of wobblers to misdemeanors,<sup>4</sup> should be interpreted in the same way as being prospective, from that point on and not for retroactive purposes. (*Rivera*, at p. 1100; see also *People v. Moomey*

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<sup>3</sup> This issue is currently before the California Supreme Court. (See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011.)

<sup>4</sup> Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

(2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: “Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanor status would not be given retroactive effect”].) The court in *Rivera* accordingly concluded that the felony status of an offense charged as a felony did not change after the Act was passed, thereby conferring jurisdiction on the Court of Appeal.<sup>5</sup> (*Rivera*, at pp. 1094-1095, 1099-1101.) We see no reason to depart from *Rivera*. Although *Rivera* addressed subdivision (k) in a different context, its analysis of subdivision (k) is equally relevant here.

The Supreme Court reached a similar conclusion in the context of enhancements when interpreting section 17. In *People v. Park* (2013) 56 Cal.4th 782 (*Park*), the Supreme Court held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b), could not subsequently be used to support an enhancement under section 667, subdivision (a). (*Park*, at p. 798.) Applying the reduction to eliminate an enhancement would be a retroactive application, which is impermissible under both section 17 and the Act. The distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*. “There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present

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<sup>5</sup> *Rivera* also noted the absence of any evidence that the voters wanted to go beyond directly reducing future and past punishment for convictions under the six included offenses. (*Rivera, supra*, 233 Cal.App.4th at p. 1100 [“Nothing in the text of Proposition 47 or the ballot materials for Proposition 47—including the uncoded portions of the measure, the official title and summary, the analysis by the legislative analyst, or the arguments in favor or against Proposition 47—contains any indication that Proposition 47 or the language of section 1170.18, subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction.”].)

crimes before the court reduced the earlier offense to a misdemeanor.” (*Park*, at p. 802.) Retroactive versus prospective application was also invoked by the Supreme Court in distinguishing cases cited by the Attorney General. “None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision] (b) to reduce a wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a subsequent serious felony offense.” (*Id.* at pp. 799-800.)

*Park* is not the only example of the Supreme Court finding that reducing a felony to a misdemeanor pursuant to section 17 is not retroactive. For example, if a defendant is convicted of a wobbler and is placed on probation without imposition of sentence, the crime is considered a felony “unless subsequently ‘reduced to a misdemeanor by the sentencing court’ pursuant to section 17, subdivision (b). [Citations.]” (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439.) “If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively.” (*Id.* at p. 439.) It has therefore long been the rule regarding section 17 that “as applied to a crime which is punishable either as felony or as misdemeanor: ‘the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter -- the judgment not to have a retroactive effect . . . .’ ” (*People v. Banks* (1959) 53 Cal.2d 370, 381-382, quoting *Doble v. Superior Court* (1925) 197 Cal. 556, 576-577.)

“Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.” (*Estate of Griswold* (2001) 25 Cal.4th 904, 915-916.) “Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be

aware of the judicial construction of the law that served as its source. [Citation.]” (*In re Harris* (1989) 49 Cal.3d 131, 136.)

The drafters of Proposition 47 and the voters knew that section 17, which contained the “for all purposes” phrase found in subdivision (k) of section 1170.18, had been consistently interpreted by the Supreme Court so as not to give retroactive effect to provide an action reducing a wobbler from a felony to a misdemeanor. Defendant does not give any reason to depart from a similar construction of the essentially identical operative text of subdivision (k).

Petitioner’s textual argument relies primarily on *Park*, a case that actually supports a contrary interpretation, and on *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*). The defendant in *Flores* was sentenced to prison following his conviction of selling heroin (Health & Saf. Code, § 11352), and his state prison sentence for that crime was enhanced by one year for a prior prison term. (*Flores*, at pp. 464, 470.) The enhancement was based on a prior felony conviction of possession of marijuana under Health and Safety Code section 11357. (*Flores*, at p. 470.) That statute had since been amended in 1975 to make possession of marijuana a misdemeanor. (*Ibid.*)

The *Flores* court noted that in 1976, the Legislature enacted Health and Safety Code section 11361.5, subdivision (b), which “authorize[d] the superior court, on petition, to order the destruction of all records of arrests and convictions for possession of marijuana, held by any court or state or local agency and occurring prior to January 1, 1976.” (*Flores, supra*, 92 Cal.App.3d at p. 471.) Also in 1976, Health and Safety Code section 11361.7 “was added to provide in pertinent part that: ‘(a) Any record subject to destruction . . . pursuant to Section 11361.5, or more than two years of age, or a record of a conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 which became final more than two years previously, shall not be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person . . . . (b) No public agency shall alter, amend, assess, condition, deny, limit, postpone, qualify, revoke,

surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title of any person because of an arrest or conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 . . . on or after the date the records . . . are required to be destroyed . . . or two years from the date of such conviction . . . with respect to . . . convictions occurring prior to January 1, 1976.’ ” (*Flores*, at pp. 471-472, italics omitted.) Based on these amendments, the court concluded that “the Legislature intended to prohibit the use of the specified records for the purpose of imposing any collateral sanctions,” such as the prior prison term enhancement. (*Id.* at p. 472.)

*Flores* is inapposite because there is no similar declaration of legislative intent for full retroactivity either in the Act generally or section 1170.18 in particular. If the Act’s drafters wanted to invalidate prior prison term allegations because the underlying felony was now a misdemeanor, they could have included legislative language like that discussed in *Flores*. They did not.

Petitioner’s arguments based on the canons of construction fare no better. Citing the maxim *expressio unius est exclusio alterius*, “under which ‘the enumeration of things to which a statute applies is presumed to exclude things not mentioned,’ [citation]” (*Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 89-90), petitioner claims that, “by explicitly carving out an exception for firearm-possession to treatment of the felony conviction as a misdemeanor upon redesignation of the conviction pursuant to Proposition 47, the electorate signaled its intention to treat the conviction as a misdemeanor for purposes of prior prison term enhancements.”

The expression of a limitation on how the misdemeanor designation applies once it has been established, however, does not clearly and compellingly imply that the electorate thereby intended to place no limitation on when the designation applies in the continuum of time. This is particularly true where, as here, the same language was held by the Supreme Court not to apply retroactively. The Act’s retroactivity is addressed in

subdivision (a) of section 1170.18, which lists the provisions subject to the Act's retroactive application. Notably absent from that list is the prior prison term enhancement. As with *Park*, this particular argument of petitioner's actually supports a contrary interpretation of the Act.

Petitioner's reliance on the Act's broad purpose "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and [to] support programs in K–12 schools, victim services, and mental health and drug treatment," (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70) as well as its provision for liberal interpretation (*id.* at § 18, p. 74) is similarly misplaced.

"[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice--it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute.'" ' [Citation.]" (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-526 [94 L.Ed.2d 533, 538], italics omitted; accord *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48.) This is true even where legislation calls for "liberal construction." (See, e.g., *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1510 [workers' compensation law].) The essence of lawmaking is the choice of deciding to what extent a particular objective outweighs any competing values, and a court in the guise of interpretation should not upset this balance where it is spelled out in the text of a statute. (*County of Sonoma*, at p. 48.) The statements of purpose in the Act

cannot be invoked to create a retroactive application that the text of the Act does not support.

The rule of lenity, “whereby courts must resolve doubts as to the meaning of a statute in a criminal defendant’s favor,” (*People v. Avery* (2002) 27 Cal.4th 49, 57) is inapplicable because its application is premised on an ambiguity that is not present in this part of the Act. “ ‘The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute’s ambiguities in a convincing manner is impracticable.’ [¶] Thus, although true ambiguities are resolved in a defendant’s favor, an appellate court should not strain to interpret a penal statute in defendant’s favor if it can fairly discern a contrary legislative intent.” (*Avery*, at p. 58.)

Petitioner’s final argument is that the Act should be applied to negate his prison priors so to avoid difficult constitutional questions. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373 [“we have repeatedly construed penal laws, including laws enacted by initiative, in a manner that avoids serious constitutional questions”].) He claims that not applying the Act retroactively to his prison priors raises serious equal protection issues. Not so.

Whether a legislative body can limit the retroactive application of a change in the law reducing punishment for crime is a settled question. “[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time.” (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [55 L.Ed. 561, 563].) This also applies to changes in sentencing law that benefit defendants. “Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense.

Numerous courts, however, have rejected such a claim—including this court.” (*People v. Floyd* (2003) 31 Cal.4th 179, 188.)

Petitioner’s reliance on *In re Kapperman* (1974) 11 Cal.3d 542 is misplaced. The Supreme Court held in *Kapperman* that a change in the law giving presentence credit for felons transferred to prison after a certain date could not be applied prospectively because it did not serve “a rational and legitimate state interest.” (*Id.* at pp. 546, 550.)

*Kapperman* “does not stand for the broad proposition that equal protection principles require that all persons who commit the same offense receive the same punishment or treatment without regard to the date of their misconduct.” (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 669.) As this court stated, “[t]he *Kapperman* court took pains to point out its decision did not apply to laws reducing punishment for crimes. ‘Initially, we point out that this case is not governed by cases [citation] involving the application to previously convicted offenders of statutes lessening the punishment for a particular offense. The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. [Citation.]’ (*Kapperman, supra*, 11 Cal.3d at p. 546.) Therefore, *Kapperman* does not prevent the prospective application of a statute reducing punishment for a crime. [Citations.]” (*People v. Lynch* (2012) 209 Cal.App.4th 353, 360, italics omitted.) We accordingly conclude that no serious constitutional issue is raised by finding that section 1170.18 does not apply to prison priors.

Since the Act does not apply retroactively to his prison priors, petitioner is not being held unlawfully and is not entitled to relief.<sup>6</sup>

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<sup>6</sup> Since defendant is not entitled to relief, we deny his motion for release pending disposition of the petition.

DISPOSITION

The petition is denied.

/s/  
Blease, J.

We concur:

/s/  
Raye, P. J.

/s/  
Hoch, J.